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No. 89-1028

# In The Supreme Court of the United States October Term, 1989

CSX TRANSPORTATION, INC.,

*Petitioner,*

*v.*

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,

*Respondents.*

On Writ of Certiorari To The
United States Court Of Appeals
For the District Of Columbia Circuit

## PETITIONER'S RESPONSE TO MOTION TO DISMISS

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## PETITIONER'S RESPONSE TO MOTION TO DISMISS

### Introduction

Respondent Brotherhood of Railway Carmen ("BRC") filed a Motion to Dismiss on May 24, 1990 (one day before Petitioner's brief on the merits was due to be filed), asking the Court to dismiss the writ of certiorari granted herein on March 26, 1990,[1] on two

[1] The Motion to Dismiss was also filed by Respondent American Train Dispatchers' Association in *Norfolk & Western Ry.* v. *American Train Dispatchers' Ass'n*, No. 89-1027 (U.S.), in which a writ of certiorari was also granted on March 26, 1990, and which the Court has consolidated with the instant case for oral argument.

grounds: first, BRC claims that the issue presented herein — whether § 11341(a) of the Interstate Commerce Act ("ICA") immunizes consolidating rail carriers from compliance with obligations arising from Railway Labor Act collective bargaining agreements — "has been rendered moot by recent actions of the Interstate Commerce Commission"; second, BRC argues that this case no longer presents an important question of federal law that should be settled by the Court. BRC Motion to Dismiss at 2. Both arguments are without merit.

BRC's motion is remarkable in several respects. First, the "recent actions" of the ICC on which BRC relies are merely the comments of the Commissioners at open voting conferences and a press release, issued on May 17, 1990, that purports to summarize the forthcoming ICC decision in the consolidated remand proceedings[2] that have resulted from the Commission's compliance with the decision issued by the United States Court of Appeals for the D.C. Circuit in this case.[3] The Commission's decision has yet to be issued. Its actual contents have not been made public.

Second, BRC's arguments are identical to those already raised by it in its Brief in Opposition to CSXT's Petition for a Writ of Certiorari. This Court rejected those arguments when, on March 26, 1990, it granted the petition. These arguments are no more meritorious now.

## Argument

### I. The Issue Presented by CSXT's Petition Has Not Been Rendered Moot by Any Actions of the Interstate Commerce Commission.

BRC's suggestion that the forthcoming ICC decision will render the issue presented in CSXT's petition moot is wholly without merit. Resolution of this issue — whether § 11341(a) of

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[2] I.C.C. Finance Docket No. 28905 (Sub-No. 22), *CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, and I.C.C. Finance Docket No. 29430 (Sub-No. 20), *Norfolk Southern Corp. — Control — Norfolk & W. Ry. and Southern Ry.*

[3] *Brotherhood of Ry. Carmen* v. *ICC*, 880 F.2d 562 (D.C. Cir. 1989); Pet. App. 1a.



the ICA exempts consolidating rail carriers from legal obligations flowing from Railway Labor Act ("RLA") collective bargaining agreements — remains vital to the proper resolution of this dispute. BRC has argued throughout these proceedings that nothing in the ICA frees CSXT from its contractual obligations or its obligation to comply with the bargaining procedures of the RLA should it seek to change those agreements. BRC has not abandoned these arguments; thus, an active controversy between the parties still exists.

Both the arbitrator appointed under the Commission's labor protection conditions and the Commission itself, on review, concluded that § 11341(a) empowered the arbitrator to adopt an implementing agreement that would allow CSXT to move the car repair work and the employees who had performed it from Waycross to Raceland, notwithstanding any contractual impediments. Pet. App. 80a-82a, 43a-44a. The D.C. Circuit, however, concluded that § 11341(a) did not immunize a carrier from compliance with contractual obligations. *Brotherhood of Ry. Carmen*, 880 F.2d at 567-68; Pet. App. 19a.

The court of appeals remanded the record back to the Commission only for limited purposes. *Id.*, 880 F.2d at 573-74; Pet. App. 25a. In compliance with the court of appeals' limited mandate, the Commission requested comments from the parties and the public on only two issues: (1) whether § 11341(a) operates to override the Railway Labor Act, and (2) the impact of Commission approval of a transaction subject to labor protection obligations under § 11347 and the Commission's standard labor conditions upon the rights and remedies of parties under the RLA and existing collective bargaining agreements.[4] As the Commissioners recognized at their February 9, 1990, public voting conference, they are bound to follow the court of appeals' interpretation of § 11341(a) as it relates to contractual obligations in the proceedings on remand.[5]

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[4] *CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, ICC Finance Docket No. 28905 (Sub-No. 22) (served Sept. 20, 1989), at 1.

[5] Transcript of February 9, 1990, Voting Conference in *CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, ICC Finance Docket No. 28905 (Sub-No. 22), at 48-49.

Accordingly, it must be assumed that the Commission's forthcoming decision will be in full compliance with the court of appeals' mandate and will comport with the court of appeals' flawed interpretation of the authority conferred on consolidating carriers by ICA § 11341(a). CSXT has demonstrated in its Brief, filed on May 25, 1990, that that interpretation is fundamentally erroneous. *See also* the Brief of Petitioners Norfolk and Western Railway and Southern Railway in Case No. 89-1027. More importantly, the ICC has similarly argued to this Court that the court of appeals has erred in this regard. *See* Brief for the Federal Respondents Supporting Petitioners in Nos. 89-1027 and 89-1028.

Thus, to the extent the Commission may articulate a "new approach" in its forthcoming decision (perhaps one based on § 11347), as the press release suggests, that "new approach" will have resulted solely from the need to comply with the court of appeals' flawed decision and not, as BRC erroneously suggests in its motion, from any determination by the Commission that, "regardless of what may be this Court's ruling on the issue pending before it, it is section 11347, not section 11341(a), that governs and restricts its actions in merger and control cases with regard to employees' contract and Railway Labor Act rights." BRC Motion at 5. To the contrary, the Brief for the Federal Respondents, filed after the press release on which BRC bases its claim of mootness, eloquently articulates the Commission's continued position that § 11341(a) exempts CSXT from legal obligations imposed by its collective bargaining agreements in this case.

This Court has repeatedly ruled that mere compliance by an administrative agency with a court's mandate does not moot the issue of the correctness of the court's decision so as to preclude subsequent Supreme Court review. *See, e.g., Schweiker* v. *Gray Panthers,* 453 U.S. 34, 42 n.12 (1981) (action of Secretary of Department of Health and Human Services in issuing provisional regulations does not moot controversy because, "[i]n issuing the provisional regulations, the Secretary simply was adhering to the lower court's reasoning and mandate"); *Maher* v. *Roe,* 432 U.S. 464, 468-69 n.4 (1977) (issuance of revised regulations "for the purpose of interim compliance with the District Court's



judgment and order" does not render case moot); *cf. Bakery Sales Drivers Local Union No. 33* v. *Wagshal,* 333 U.S. 437, 442 (1948) (union's conduct in lifting challenged boycott in "obedience to the judgment now here for review" does not render case moot). A similar determination is compelled here.

Prior to the court of appeals' decision herein, CSXT had obtained from the ICC and its arbitrator an arbitrated implementing agreement that provided for the transfer of car repair work and BRC-represented employees from Waycross to Raceland. That result may now be in jeopardy, if the Commission's press release is to be believed, because of the court of appeals' erroneous interpretation of § 11341(a). Because of the court of appeals' flawed analysis, CSXT may now again be required to engage in fruitless negotiations with BRC and to participate in further proceedings before the arbitrator seeking another implementing agreement. The collective bargaining agreements and RLA provisions asserted by BRC will remain obstacles to this shop consolidation unless overridden. For BRC to claim that "the issue of the meaning and effect of section 11341(a) is no longer material to the pending disputes" (BRC Motion at 5) and that this matter is now moot is wildly disingenuous.

## II. The Issue of the Proper Interpetation of ICA § 11341(a) Is a Matter of Substantial Federal Importance.

BRC also argues in its Motion to Dismiss that the "actions" of the ICC have "drained the cases as currently presented to this Court of any general importance for future railroad merger and control cases approved pursuant to the Interstate Commerce Act." BRC Motion to Dismiss at 6. This argument too is simply wrong. Indeed, to the extent the ICC press release demonstrates that the court of appeals' erroneous interpretation of a key provision of the ICA has forced the Commission to depart from its well-established precedent, these "actions" provide further support for this Court's grant of certiorari on March 26, 1990.

As CSXT has shown in both its Petition for Writ of Certiorari and its Brief, the court of appeals' decision is inconsistent with

controlling precedent from this Court[6] and with a long line of decisions from other courts of appeals, ignores both the plain meaning and the persuasive legislative history of § 11341(a), and threatens to impede the accomplishment of Congress' national transportation policy. The Federal Respondents agree. The decision has already infected other court of appeals'[7] and ICC decisions.[8] The ICC press release suggests it may continue to influence the outcomes of all future Commission decisions in this area.

Accordingly, the reasons for review by this Court of the court of appeals' decision remain compelling and in fact are reinforced by the so-called ICC "actions".

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[6] *See, e.g., Schwabacher* v. *United States*, 334 U.S. 182 (1948); *United States* v. *Lowden*, 308 U.S. 225 (1939); *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 298 (1987) (Stevens, J., concurring).

[7] *Brotherhood of Locomotive Engineers* v. *ICC*, 885 F.2d 446 (8th Cir. 1989); *Railway Labor Exec's' Ass'n* v. *ICC*, 883 F.2d 1079 (D.C. Cir. 1989).

[8] *Brandywine Valley R.R. — Purchase — CSX Transportation, Inc.*, 5 I.C.C.2d 764 (1989), *appeal docketed*, No. 89-1503 (D.C. Cir.).



## Conclusion

The Motion to Dismiss filed by Respondent Brotherhood of Railway Carmen should be denied.

Respectfully submitted,

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